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No. 464

In the Supreme Court of the United States

OCTOBER TERM, 1947

FEDERAL TRADE COMMISSION, PETITIONER

v.

MORTON SALT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Seventh Circuit entered in this cause on May 27, 1947, which set aside an order of the Federal Trade Commission requiring the respondents to cease and desist from making certain discriminations in price between purchasers of salt.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 2114–2127) is reported in 162 F. 2d 949.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 27, 1947 (R. 2127) and a peti-

tion for rehearing was denied on September 4, 1947 (R. 2129). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, which is made applicable by Section 11 of the Clayton Act, 38 Stat. 734, 15 U. S. C. 21.

QUESTIONS PRESENTED

1. Whether, in a proceeding under Section 11 of the Clayton Act to enforce Section 2 of that Act against a respondent using a quantity discount system, the Federal Trade Commission has the burden not only of proving a price discrimination which may substantially injure competition, but also of proving that the price discrimination does not merely reflect differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which the commodity is sold or delivered.

2. Whether the finding of the Commission that the effect of respondent's price discriminations may be substantially to impair, injure or destroy competition is supported by substantial evidence.

3. Whether the Commission, having found a quantity discount system to be violative of Section 2 (a) of the Clayton Act, exceeds its jurisdiction if it does not limit its order to cease and desist to the particular discount system unlawfully employed in the past.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly

discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

The Federal Trade Commission brought this proceeding under Section 11 of the Clayton Act charging respondent with violating Section 2 of that Act as amended by the Robinson-Patman Act of June 19, 1936. After hearing, the Commission made findings of fact (R. 2069) and entered a

cease and desist order (R. 2079). Thereafter, respondent filed in the court below a petition to review this order (R. 2092). Subsequently, pursuant to stipulation, the cause was remanded to the Commission for modification of the findings and of the order (R. 2109). On April 14, 1945, the Commission filed modified findings of fact and issued a modified order (R. 2081, 2090). Respondent thereupon filed an amended petition for review of the modified order (R. 2099) and the Commission filed a cross-petition for its enforcement.

Pertinent modified findings of fact are as follows:[1]

Respondent is one of the larger manufacturers and distributors of salt in the United States (R. 7). It manufactures various grades of table salt, its principal and best brand being known as "Blue Label" salt. Respondent sells its salt to wholesale and retail purchasers located in various states in substantial competition with other vendors of salt (R. 2083). Since 1936, respondent has been discriminating in price between competing wholesalers and competing retailers by means of its so-called "quantity discount system" and otherwise (R. 2083–2087). Respondent sells its Blue Label salt to both wholesalers and retailers at

[1] Although the court below found to the contrary, the findings are all fully supported by the evidence. See pp. 15–16, *infra*. Most of the underlying facts are undisputed.

$1.60 a case when purchased in less than carload lots and at $1.50 a case when purchased in carload lots. Respondent grants, in addition, a rebate of ten cents from the carload price to those who purchase five thousand or more cases in any consecutive twelve-month period and a rebate of 15 cents from the carload price to those who purchase 50,000 or more cases during any consecutive twelve-month period (R. 2083–2085). Only four customers—American Stores Company, National Tea Company, Safeway Stores, Inc., and Great Atlantic & Pacific Tea Company—have ever purchased a sufficient quantity to qualify for the latter rebate. These customers are all retailers and the rebates enable them to sell to the consuming public at prices less than those at which wholesalers could reasonably sell to their retail customers (R. 2085–2086). In connection with its sale of other brands of salt than Blue Label, respondent grants a one-unit or approximately 5% discount to wholesalers and retailers who purchase in carload lots; and to those who purchase during a consecutive twelve-month period table salt of the value of $50,000 or more, respondent allows an additional unit discount. Purchases of Blue Label salt are included in determining the total amount of table salt purchased (R. 2086).

Respondent has also discriminated in prices between different purchasers of like grade and quality of salt by means of special allowances or

discounts to favored customers. For example, respondent has for several years made to Consolidated Company, Inc., of Plaquemine, Louisiana, a special allowance of 7½ cents a case from the carload price of $1.50 on its Blue Label salt. Consolidated is a wholesaler operating 22 units or branches throughout the State of Louisiana in competition with other wholesale grocers who do not receive this special discount (R. 2086–2087).

The Commission found that customers of respondent who received the benefit of the special discounts have a substantial advantage in selling respondent's salt in competition with other customers; the latter either reduced their possible profits or lost business by charging higher prices than their competitors (R. 2088). The effect of the large price differentials granted the chain stores is particularly harmful to the competition between the small retailers and the chains (R. 2088–2089).

The Commission found (1) that respondent's price differences constitute discriminations in price between purchasers of commodities of like grade and quality, (2) that their effect may be substantially to lessen competition in the line of commerce in which the purchaser receiving the benefit of discriminatory prices is engaged and to injure, destroy and prevent competition between those purchasers receiving the benefit of the discriminatory prices and those to whom they are

denied, and (3) that the respondent has not shown the existence of facts which might indicate or prove that the price discriminations were made in good faith to meet an equally low price of a competitor (R. 2087).

The court below conceded that under the statute quantity discounts were permissible only if based upon differences in costs resulting from differences in the method or quantity in which the commodities are sold or delivered (R. 2118). The Commission found that respondent's price differences were not shown to have been so justified (R. 2089). The court below concluded that there was evidence which in its view required a different finding as to the discount for carload lots;[2] as to the other quantity discounts the court stated that there was no evidence either way as to whether the discounts were related to differences in costs (R. 2122–2123).

The court below set aside the Commission's order. The court construed Sections 2 (a) and 2 (b) of the Clayton Act as placing upon the Commission the burden of proving (1) the fact that different prices were charged, (2) a probable injury to competition thereby, and (3) the absence of any cost justification for the price differential. It then found that the Commission had

[2] We submit that this ruling of the court below was erroneous and have specified it as error. The primary basis for certiorari, however, lies in the court's ruling as to the burden of proof for justifying the other discounts.

failed to carry the burden with respect to (2) and (3) (R. 2123). The court was also of the opinion that the order to cease and desist exceeded the jurisdiction of the Commission because of its general and sweeping language (R. 2125). Minton, C. J., dissenting, was of the opinion that the quantity discount system was *per se* discriminatory and could be justified only if properly related to costs of production, sale and delivery, that the discrimination would in itself have supported the inference that the effect would be to lessen competition, but that in any event the finding of probable injury to competition was supported by "abundant" evidence (R. 2126–2127).

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In construing Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, to require the Commission to bear the burden of proving that respondent's quantity discount system does not merely make due allowances for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which goods are sold or delivered.

(2) In holding that the finding of the Commission that the effect of the respondent's discriminations may be substantially to impair, injure or destroy competition is not supported by substantial evidence.

(3) In holding that other findings of the Commission are not supported by substantial evidence.

(4) In weighing the evidence for itself, drawing its own inferences and substituting its judgment for that of the Commission.

(5) In failing to hold that the findings of the Commission are sufficient to support its order.

(6) In holding that the order of the Commission is in excess of its jurisdiction.

(7) In holding that the order of the Commission is too general and sweeping.

(8) In holding that the order of the Commission cannot properly prohibit more than the use of the particular discount system found to have been employed in the past.

(9) In setting aside the order of the Federal Trade Commission.

REASONS FOR GRANTING THE WRIT

1. This case presents a question as to the proper construction of Sections 2 (a) and 2 (b) of the Clayton Act which is of major importance in the administration of the Act and which has not been but should be settled by this Court. The statute makes price discrimination unlawful (1) where the effect may be to lessen competition or tend to create monopoly or to injure, destroy, or prevent competition with any person receiving the benefit of the discrimination, or with his customer, and (2) provided that this shall not apply to quantity

differentials which make only due allowances for differences in costs.[3] Section 2 (b) further provides that—

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: * * *.

The Commission has construed these provisions as making the first of the above factors, potential injury to competition, an essential element of its case, but as imposing upon the seller the burden of showing as justification that discriminations based upon quantity are related to cost savings. The Circuit Court of Appeals for the Second Circuit has gone further and held, despite the fact that the Commission had made no such contention,[4] that once the Commission had proved sales at different prices the burden was on the seller to prove that the discrimination did not lessen

[3] There is also a proviso permitting the seller to show that the lower price was made in good faith to meet the equally low price of a competitor. This factor is not involved in this case.

[4] See the Commission's brief in opposition in this Court, 1945 Term, No. 230, pp. 7–8.

competition. *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378 (C. C. A. 2), certiorari denied, 326 U. S. 734. Although the point was not in issue in the *Moss* case, the reasoning of the *Moss* opinion would unquestionably also have shifted the burden of proof as to the cost justification for quantity discounts.

The court below in this case has held that it is incumbent upon the Commission not only to establish affirmatively the probable injury to competitors, but also the lack of cost justification. This interpretation of the statute is not only contrary to the Commission's position, but also *a fortiori* in conflict with the reasoning of the Second Circuit in the *Moss* case.

Both this conflict in approach and the vital importance of the issue make it essential that this Court determine which of these positions is correct. For the Commission's task of enforcing the statute would be immeasurably greater if it were required affirmatively to prove in each case that a quantity discount was not based upon cost factors. The pertinent facts as to such an issue are peculiarly within the knowledge of the seller, and the nature of the problem is such as to make it much more reasonable to require the seller to prove that the discrimination was justified.*

* The decision below has been the subject of critical comment. 42 Ill. Law Rev. 556 (1947); 60 Harv. L. Rev. 1167 (1947).

2. The construction adopted by the court below is clearly contrary to the intention of Congress. The original language of Section 2 of the Clayton Act was construed to permit quantity discounts irrespective of whether the amount of the discount was related to savings and costs resulting from the larger quantity sold. *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 92 F. 2d 677 (C. C. A. 6), 304 U. S. 257, 101 F. 2d 620 (C. C. A. 6), certiorari denied, 308 U. S. 557. The Robinson-Patman Act was designed, *inter alia*, to insure that differentials to large purchasers should be no greater than were justified by savings in costs. H. Rep. 2287, pp. 3, 9–10, S. Rep. No. 1502, pp. 3, 5–6, 74th Cong., 2d Sess. Section 2 (a) accordingly modified the prior proviso relating to quantity discounts to read as follows:

> *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

Even apart from the specific provision as to burden of proof in Section 2 (b) of the 1936 Act, under established principles of construction the burden would be upon the respondent to bring himself within this exception. *United States* v. *Dickson*, 15 Pet. 141; *McKelvey* v.

United States, 260 U. S. 353, 357; *United States* v. *Cox*, 147 F. 2d 587, 588 (C. C. A. 7), certiorari denied, 325 U. S. 858; *Green, Moore & Co.* v. *United States*, 19 F. 2d 130, 131 (C. C. A. 5), certiorari denied, 275 U. S. 549. But Section 2 (b), quoted *supra*, p. 11, removes any doubt as to this, since it provides that once there has been proof of "discrimination" "the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section." In this connection the Senate Report stated (p. 3).

> Section 2 (a) attacks directly the problem of discrimination in prices and terms of sale. Like present section 2 of the Clayton Act it contains a general prohibition against such discriminations, from which certain specified exceptions are then carved, *thus throwing upon any who claim the benefit of those exceptions the burden of showing that their case falls within them.* [Italics supplied.]

The court below held Section 2 (b) inapplicable on the ground that "discrimination" could not be found to exist unless the quantity differential was first proved to be unjustified by costs. The opinion states that discrimination "occurs as a matter of law only when Section 2 (a) of the Clayton Act, as amended, is in fact violated" (R. 2119), and that "in the absence of evidence and finding * * * in the case of quantity price

differentials, that same were not related to reasonable cost allowances, there would be no wrongful discrimination, and the defense of justification would not be in order" (R. 2123). Such a construction of the Act nullifies the provision in Section 2 (b) for imposing the burden of proof of justification upon the seller. For under the view of the court below the Commission must prove lack of cost justification in order to show a discrimination.

3. The court below also held that the burden was on the Commission to show that the discrimination affected competitors, and that the evidence did not support the Commission's finding on this point. On this issue the Commission had assumed the burden of proving injury to competitors. Weighing the evidence for itself and coming to a contrary conclusion, the court below substituted its own judgment on the evidence and the inferences to be drawn therefrom for those of the Commission.

The Commission amply established probable injury to competition. There was testimony that the discounts forced the nonfavored customers to resell at substantially reduced profit (R. 182–183, 192–193, 417–418, 507, 732, 745, 812, 969–970, 1055–1056, 1067, 805, 906–908). If they did not sell at reduced prices they would lose business not only in salt but in other merchandise (R. 417–418, 656, 701, 791, 873, 908, 927–928, 1056, 1085,

1175, 1239). In many instances it was proved that business had already been lost (R. 683–684, 816–817, 873, 884, 919, 936, 945, 1081–1082, 1106–1107, 1110–1111). Some of this testimony was based upon the actual experience of wholesale and retail grocer witnesses. The remaining testimony is based upon the opinions of wholesale and retail grocer witnesses who were shown to be amply qualified to render an opinion. Despite the court's statement to the contrary, there is not in the record a single example of an opinion witness not shown to be qualified by extensive experience in the grocery business and therefore qualified to testify as to the effect of price differentials on competition in the wholesale and retail grocery business. Their evidence, rather than the opposing testimony introduced by respondent, is inherently believable and the Commission was entitled to rely upon it.

The fact that the opinions expressed were at variance with other evidence does not mean that the court below may weigh the conflicting testimony after the Commission has made its findings. This Court has said that a reviewing court is forbidden "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. In weighing the evidence for itself and drawing its own inferences the court below

has disregarded a principle repeatedly affirmed by this Court. See *Medo Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 681–682n; *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, *supra*; *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 739; *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 760; *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50, 60; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 107.

4. The court below erroneously held that the order of the Commission is in excess of its jurisdiction because of its general and sweeping language. The order prohibits price discriminations among wholesale and retail dealers not justified by differences in the cost of manufacture, sale or delivery, by selling to competing wholesalers or retailers at different prices (except that there is permitted a price difference of less than five cents which does not tend to injure competition) and by selling to a retailer at lower prices than those charged a wholesaler whose customers compete with the retailer (R. 2090–2091). The meaning of the provisions is sufficiently clear. They are quite specific, and are no more sweeping or general than is inherent in the necessities of the situation. A proper order can not be confined to

a prohibition against future use of only the particular discount system used in the past; otherwise ease of evasion would render the order a futile though costly gesture. But in any event even if the order were in fact excessively sweeping or general, we submit that this would only present a case for the exercise of the court's power to modify the order rather than to set it aside. This was the remedy applied in the cases upon which the lower court relied. *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426; *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 478 (C. C. A. 7). See in addition *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608.

CONCLUSION

For the above reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

W. T. KELLEY,
General Counsel,
Federal Trade Commission.

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